(4)

No. 08-1117

In The
Supreme Court of the United States

SCOTT DAVID BOWEN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Court Of Appeals

BRIEF OF JEFFREY ABRAMSON, CAROLINE L. DAVIDSON, SHARI S. DIAMOND, THEODORE EISENBERG, PHOEBE C. ELLSWORTH, SAMUEL R. GROSS, VALERIE P. HANS, STEPHEN KANTER, NORBERT L. KERR, STEPHAN LANDSMAN, ROBERT J. MACCOUN, SUSAN F. MANDIBERG, MARGARET L. PARIS, JEFFREY J. RACHLINSKI, MARY R. ROSE, MICHAEL J. SAKS AND NEIL VIDMAR AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF AMICUS CURIAE[1]

Amici are university professors whose teaching and scholarship have addressed historical, behavioral, and constitutional questions about jury unanimity. Amici are identified in the Appendix.

SUMMARY OF ARGUMENT

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), a fractured Court concluded that the Sixth and Fourteenth Amendments did not mandate the traditional requirement of unanimity for criminal jury trials in state courts. The Court recognized that unanimity had been a requirement of common-law juries for hundreds of years, but a plurality considered that historical background unimportant. Instead, the plurality relied on a functional test for jury procedures, and concluded that non-unanimous decision making was consistent with the essential functions of the jury, as the plurality saw them. In the process, the plurality assumed that non-unanimous jury deliberations would be as robust, and that minority viewpoints would be as thoroughly

[1] This brief was drafted exclusively by the named amici. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file; they have consented to the filing of this brief.

represented, as in deliberations by traditional juries. These factual assumptions were questionable in 1972, but there was little systematic evidence one way or the other. We have since learned that they are wrong. Empirical studies conducted since 1972 show that jury deliberations are in fact less vigorous when unanimity is not required, and that the unanimity requirement is necessary to ensure that minority voices receive full hearing. Accordingly, we urge the Court to grant certiorari in *Bowen v. Oregon,* No. 08-1117, to reconsider *Apodaca* and *Johnson*.

ARGUMENT

1. Introduction

Apodaca v. Oregon, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), produced a fractured set of opinions with an array of interpretations of history, precedent, and the text of the Constitution. We write to address one of the bases for the plurality opinions in *Apodaca* and *Johnson*: the effect of the unanimity requirement on jury functioning. The unanimity requirement's impact on jury deliberations, and its effect on community support for jury verdicts, were the subjects of a heated debate between the plurality and the dissent. The plurality concluded that removal of the unanimity requirement would not undercut features of jury decision making that it considered essential. We express no general view on the

appropriateness of this functional test for the constitutionality of modifications of traditional jury procedures, which was first announced by the Court in *Williams v. Florida,* 399 U.S. 78 (1970), but if it is employed its factual premises ought to be correct. In this case they are not.

When the Court decided *Apodaca* and *Johnson* 37 years ago, no empirical studies had directly compared jury functioning under unanimous and non-unanimous verdict rules. A single study in *The American Jury* by Harry Kalven, Jr., and Hans Zeisel provided some indirect empirical evidence on the frequency of hung juries, and on the likelihood that jurors holding a minority position on the first ballot would persuade the majority. HARRY KALVEN, JR., AND HANS ZEISEL, THE AMERICAN JURY (1966). Both the plurality and the dissent in *Apodaca* and *Johnson* cited that work, drawing different conclusions from the study. The study itself provided no evidence on the robustness of deliberations or the treatment of minority views on the jury. All members of the Court recognized that full and open debate was a crucial feature of jury deliberations, but they were forced to rely on their own intuitions about jury behavior. Specifically, the plurality concluded that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca,* 406 U.S. at 411.

Since 1972 substantial empirical evidence has accumulated that sharply contradicts the assumptions

about jury functioning in the plurality opinions, and supports those made by the dissenting opinions. This new evidence includes: a study of felony jury trials in multiple jurisdictions, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem?* (2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf.; a study of actual civil jury deliberations, Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-unanimous Jury*, 100 N.W. U. L. REV. 201 (2006); a study of non-unanimous criminal trial verdicts in Oregon, Oregon Office of Public Defense Services Appellate Division, On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission (May 21, 2009), *available at* http://www.ojd.state.or.us/osca/opds/Reports/index.html; and several jury simulation studies, summarized in Dennis L. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001); REID HASTIE, STEVEN D. PENROD, AND NANCY PENNINGTON, INSIDE THE JURY (1983); MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977). It is now clear that jury functioning is significantly compromised when the traditional requirement of jury unanimity is removed.

Our conclusions are informed by findings from different types of jury research, each with its own

strengths. Comparing jury outcomes across jurisdictions with unanimous and non-unanimous decision rules provides information about what occurs in practice in jury systems that operate under these different decision rules. Jury questionnaires offer a juror's-eye view of the experience of deliberating under a particular decision rule. Jury simulation experiments that randomly assign groups to deliberate under either a unanimous or a majority decision rule allow researchers to make clear causal assessments concerning the impact of a decision rule on group and individual behavior. Observations of actual juries provide direct information on jury deliberations. Some of the limitations of these diverse research approaches – memory problems in juror self-reports, for example, or difficulties in drawing inferences about jury behavior from data on the outcomes of actual cases – are offset by the special strengths of the other methodologies – e.g., the behavior observed in actual deliberating juries. Social scientists generally agree that the optimal way to examine social phenomena is with multiple methodologies, and that the strongest conclusions are those that are supported by consistent findings based on different methods. That is what we see here.

2. Unanimity promotes robust jury deliberations

To achieve a robust deliberation, a jury must engage in a thoughtful and thorough evaluation of the evidence rather than simply taking a swift vote

or conducting a perfunctory discussion to resolve differences. Justice White, writing for the plurality in *Johnson,* claimed that a "majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose . . . " *Johnson*, 406 U.S. 361. The dissenting Justices were unconvinced. Justice Douglas wrote of the danger of non-unanimous verdicts: "The Court now extracts from the jury room this automatic check against hasty factfinding by relieving jurors of the duty to hear out fully the dissenters." *Johnson*, 406 U.S. 389. Empirical evidence from jury studies conducted in the years since *Apodaca* and *Johnson* confirms Justice Douglas's intuition that robust deliberations are promoted by requiring unanimity, whether measured by intensity of effort to reach agreement, the length of deliberations, or the breadth of topics considered.

Diamond et al. (2006) examined the deliberations of actual Arizona civil juries in which only six of eight jurors had to agree to the verdict. They found that jurors were quite conscious that they needed only a six-to-two majority in order to return a verdict. On some juries the majority attempted to persuade those in the minority even when their votes were not required; on other juries, the majority relied on the fact that they were permitted to deliver a majority verdict, terminated any attempt to resolve differences, and ended the debate when the required minimum vote was reached. On those juries, once the

requisite majority was achieved, dissenting views were dismissed.

The Appellate Division of the Oregon Office of Public Defense Services recently analyzed felony jury trial records from 662 indigent appeal requests handled by that division in 2007 and 2008, or 46.5% of *all* felony jury trials in Oregon in that two-year period. Oregon Office of Public Defense Services Appellate Division (2009). The juries were polled in 63% of this sample of trials. In 65.5% of the trials in which we know the final vote – nearly two thirds of the cases in the sample – the jury reached a non-unanimous verdict on at least one of the counts (*id.*). Even making allowance for the possibility that cases handled on appeal by the Office of Public Defense may not be fully representative of all felony trials in Oregon, these findings indicate that non-unanimous felony verdicts are common in Oregon, perhaps occurring in a majority of all felony trials. By contrast, hung juries occur in only a few percent of trials in jurisdictions that require unanimous verdicts. See *infra*, section (6). These results imply that when unanimity is required, juries spend more time and care before reaching unanimous verdicts for one side or the other.

Laboratory studies conducted since *Apodaca* and *Johnson* have also found that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach non-unanimous verdicts. See James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt, and

David Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules,* 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975); Devine et al. (2001); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury,* 39 SOCIOMETRY 305 (1976); HASTIE ET AL. (1983); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules,* 7 J. APPLIED SOC. PSYCH. 38 (1977); and SAKS (1977). When unanimity was not required, jurors tended to end their deliberations soon after the required quorum was reached.

Evidence that juries take longer to reach a verdict when they are required to be unanimous is a strong sign that the unanimity rule promotes robust deliberation. Another measure of the robustness is the extent to which the jury thoroughly covers key factual material during its deliberations. One controlled jury experiment found that juries assigned to a rule requiring unanimity not only spent more time discussing the evidence – consistent with their longer deliberations – but also rated those deliberations as more thorough than juries assigned to a non-unanimous decision rule. HASTIE ET AL. (1983). Similarly, post-trial evaluations by real jurors deliberating under a non-unanimous decision rule revealed that jurors who reached unanimous verdicts rated their deliberations as more thorough than both majority and holdout jurors who served on juries that ended with non-unanimous verdicts. Diamond et al. (2006).

3. Unanimity ensures that jurors with minority views participate fully and that their positions receive attention from those in the majority

Although jurors typically treat one another with respect, they are also practical. When unanimity is not required, jurors may give short shrift to those in the minority, whose votes the decision rule has made superfluous. In *Johnson*, Justice Brennan argued in dissent that "[w]hen verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace." *Johnson*, 406 U.S. 306. Recent empirical evidence supports Justice Brennan's reasoning.

Several experimental jury simulation studies have found that jurors holding minority views participate less and are seen as less influential when unanimity is not required. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1 (2001); VALERIE P. HANS AND NEIL VIDMAR, JUDGING THE JURY, 174-75 (1986); HASTIE ET AL. (1983). Minority jurors operating under a majority decision rule are less likely to report that they made the arguments that they wanted to make, compared to minority jurors deliberating under a unanimity rule. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition*

and Assigned Rule on the Judgment of Mock Juries, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976). As a juror in a six-to-two majority told a fellow juror in the minority during deliberations in an Arizona civil trial, "no offense, but we are going to ignore you." Diamond et al. (2006), at 216.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court held that the Sixth Amendment requires that a criminal trial jury be drawn from a representative cross-section of the community in which the trial occurs. The unanimity requirement is a key element in promoting meaningful jury participation by all segments of the community, consistent with *Taylor* and many other Supreme Court decisions. See JEFFREY ABRAMSON, WE, THE JURY (1994); NANCY S. MARDER, THE JURY PROCESS (2004); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations,* 113 HARV. L. REV. 1261 (2000). In particular, to the extent that those holding minority views are members of racial or ethnic minorities, a non-unanimous decision rule undermines their ability to influence outcomes and threatens the legitimacy of the system whenever juror opinions split along racial or ethnic lines, as they sometimes do. Taylor-Thompson (2000). As Justice Stewart said in his *Johnson* dissent, "[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the

fair performance of the vital functions of a criminal court Jury." *Johnson*, 406 U.S. 398.

4. Unanimity provides the opportunity for jurors with minority views to persuade the majority

Most jury verdicts generally are consistent with the position of the majority on the first ballot. Nonetheless robust deliberations provide an opportunity for those in the minority to persuade their fellow jurors to change course. This need not be as dramatic as the complete turn-around depicted in the classic film *Twelve Angry Men*. TWELVE ANGRY MEN (VA/Onion-Nova Productions 1957). Nonetheless, it allows dissenters to point out nuances that might lead to a consensus that not all charges have been proved, or that a lesser included charge is more appropriate, after a more thoughtful and thorough consideration of the evidence. By contrast, a non-unanimous decision rule undermines the minority from the start.

Recently, the National Center for State Courts conducted a study of the causes of hung juries in felony trials in four jurisdictions, all of which require jury unanimity. Hannaford-Agor et al. (2002); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, and G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003). Questionnaires from approximately 3500 jurors provided information on the jury's first ballots and final verdicts. In most

cases, a verdict was reached and the verdict favored by a majority on the first ballot prevailed. Notably, however, in over ten percent of the cases, jurors who favored a minority position at the time of the first ballot were able to convince the majority jurors to adopt the minority's favored verdict. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries,* 82 CHI-KENT L. REV. 579, 583, Figure 1 (2007). This finding probably understates minority influence under a unanimity decision rule, since often there is considerable discussion before a first ballot is taken.

5. Unanimity promotes confidence in the accuracy and fairness of the jury's verdict

In *Johnson*, Justice Powell, concurring in the judgment permitting non-unanimous verdicts in criminal trials in state courts, assumed that community confidence in and respect for jury verdicts would not be undermined by a rule permitting non-unanimous verdicts. *Johnson*, 406 U.S. 374. Two types of empirical studies call this assumption into question. First, jurors themselves are less confident in the accuracy of their own verdicts when they are not required to agree unanimously. HASTIE ET AL. (1983); SAKS (1977); Nemeth (1977). Second, community residents who rated the procedures used in jury trials viewed unanimous procedures as fairer and more accurate than non-unanimous procedures. Robert J. MacCoun and Tom Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural*

Fairness, Accuracy, and Efficiency, 12 LAW & HUM. BEHAV. 333 (1988).

6. The unanimity requirement has only a modest impact on the frequency of hung juries

Juries required to reach unanimity are more likely to hang than juries permitted to arrive at a verdict without obtaining consensus, but the available data suggest that the difference is modest, approximately 5.6% versus 3.1%. KALVEN & ZEISEL (1966), at 461. The reason for this modest difference is that hung juries are rarely caused by one or two jurors who are consistently at odds with the rest of the jury. Rather, hung juries are most likely when the jury is initially more evenly divided. For example, in the National Center for State Courts study of felony juries, in those cases in which only one or two jurors were in the minority on the first ballot, only 2.9% ended with a hung jury. Hannaford-Agor et al. (2002), at 66, Table 5.2. In the 83 percent of the cases in which hung juries did occur, the minority position was initially supported by at least three jurors (*id.*). This result replicates a tentative finding reported by Kalven and Zeisel, showing that hung juries tend to occur only when a substantial minority exists, rather than when a single eccentric juror or even two jurors refuse to see reason. KALVEN AND ZEISEL (1966). Jury deadlocks predominantly reflect genuine disagreement over the weight of the evidence, rather than the irrationality or stubbornness of one or two unreasonable jurors. When deliberations begin with an

overwhelming majority favoring one verdict or the other, they are highly unlikely to end in a hung jury.

Hung juries, of course, impose costs – primarily the cost of repeating trials – but these costs are limited. Not only are hung juries rare, but the evidence indicates that only about a third of cases that produce hung juries are retried. Over half are disposed of by plea agreements, dismissals, or other dispositions. Hannaford-Agor et al. (2002), at 26-27.

CONCLUSION

For the reasons stated, amici respectfully urge the Court to grant certiorari in order to reconsider the holdings and the reasoning of *Apodaca v. Oregon* and *Johnson v. Louisiana*.

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